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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DANIEL VASQUEZ, Warden of the California State Prison at San Quentin,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

DAVID L. MURTISHAW,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal district court engaged in collateral review ignore California's procedural default rules simply because the California Supreme Court retains discretion in the application of those rules?

2. Is mandamus an appropriate remedy to review an order denying a motion to dismiss for procedural default, when petitioner has no other means of reviewing the procedural default issue?

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

DAVID L. MURTISHAW,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Daniel Vasquez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on May 20, 1993.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit in Case No. 93-70426, filed May 20, 1993, denying petitioner's petition for writ of mandamus, appears in Appendix E. The order of the United States District Court for the Eastern District of California, in Case No. CV-F-91-508-OWW/P, filed February 16, 1993, denying petitioner's motion to dismiss, appears in Appendix C. The order of the United States District Court for the Eastern District of California, in Case No. CV-F-91-508-OWW/P, filed on April 14, 1993, denying petitioner's motion for reconsideration and for interlocutory appeal, appears in Appendix D. The order of the Supreme Court of the State of California, filed June 20, 1991, denying real party's petition for writ of habeas corpus, appears in Appendix A. The order of

the Supreme Court of the State of California, filed September 2, 1992, denying real party's petition for writ of habeas corpus appears in Appendix B.

JURISDICTION

Real party in interest Murtishaw invoked federal jurisdiction under 28 U.S.C. section 2254 by filing a petition for writ of habeas corpus in the United States District Court for the Eastern District of California.

On February 16, 1993, respondent denied petitioner's motion to dismiss six claims of real party's in interest first amended petition for writ of habeas corpus.

On May 12, 1993, petitioner filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit seeking an order directing respondent to grant petitioner's motion to dismiss.

On May 20, 1993, the United States Court

of Appeals for the Ninth Circuit filed an order denying the petition for writ of mandamus. No petition for rehearing was sought. The jurisdiction of this Court to review that order is invoked pursuant to 28 U.S.C., section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves 28 U.S.C., section 2254(b),

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such

process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

On January 25, 1979, real party in interest David L. Murtishaw was convicted in the Superior Court of the State of California, County of Kern, of three counts of first degree murder, one count of assault with intent to commit murder, and of the use of a firearm during the commission of all four offenses.

On February 7, 1979, real party was sentenced to the penalty of death.

On July 27, 1981, the California Supreme Court affirmed the findings of guilt against real party, and reversed the death penalty due to improper admission of evidence of expert opinion regarding predictions of real party's future violent behavior. (*People* v. *Murtishaw*, 29 Cal.3d 733 (1981).)

On March 18, 1993, following a second

penalty trial, real party was again sentenced to the penalty of death.

On June 8, 1989, the California Supreme Court affirmed real party's judgment in full. (*People* v. *Murtishaw*, 48 Cal.3d 1001 (1989).)

On June 25, 1990, this Court denied real party's petition for writ of certiorari.

On June 20, 1991, the Supreme Court of the State of California denied real party's petition for writ of habeas corpus. Three claims of that petition were denied "on the independent additional ground that they were waived by failure to raise them on direct appeal." Further, the order states, "All claims related to the guilt and special circumstance judgment are denied on the independent additional ground that the petition fails to justify the delay in raising them."

On October 3, 1991, respondent court

stayed real party's October 11, 1991, execution date following the filing of his petition for writ of habeas corpus.

On November 22, 1991, petitioner filed a motion to dismiss for procedural default.

On March 27, 1992, respondent court ordered real party to return to the California Supreme Court to exhaust the unexhausted claims contained in his petition.

On September 2, 1992, the California Supreme Court denied real party's petition for writ of habeas corpus. Three claims were denied "for the independent reason that they are untimely."

On October 14, 1992, real party filed a first amended petition for writ of habeas corpus in respondent court.

On October 29, 1992, petitioner filed a motion to dismiss various claims of the petition for procedural default.

On February 16, 1993, respondent denied petitioner's motion to dismiss.

On April 14, 1993, respondent denied petitioner's motion for reconsideration and request for statement permitting interlocutory appeal.

On May 12, 1993, petitioner filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit seeking an order directing respondent court to grant petitioner's motion to dismiss for procedural default.

On May 10, 1993, the United States Court of Appeals for the Ninth Circuit denied the petition for writ of mandamus.

REASONS FOR GRANTING THE WRIT

"This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." (*Coleman* v.

Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2252 (1991).)

This is indeed a case about federalism; it presents the question whether a federal district court may be permitted to undermine California's long-established procedural default rules. The import of this case is far-reaching. If California's procedural default rules are allowed to be undermined in this case, the error may be repeated in countless cases, threatening federalism by interfering with California's fundamental interest in the administration of its own criminal justice system. California's procedural default rules are well-defined and regularly followed; the rules should be respected even though the California Supreme Court retains discretion to forgive procedural defaults in certain cases.

The order of the United States Court of Appeals for the Ninth Circuit denying the

writ of mandamus was clear error. If petitioner is not entitled to seek relief by mandamus, petitioner is left with no means by which to remedy the error of the district court. A motion to dismiss various claims of a petition for writ of habeas corpus is a vehicle to end litigation of those issues, eliminating the burden on the parties and the judicial system of litigating those claims on the merits. If petitioner has no remedy prior to litigation on the merits, then all parties will be subjected to an expenditure of time and money which will never be recoverable. If petitioner is forced to litigate these claims on the merits, and if petitioner is successful on the merits, petitioner will be unable to appeal at that point for the purpose of protecting California's interest in preserving its procedural default rules.

"We now recognize the important interest

in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." (*Coleman* v. *Thompson*, *supra*, 111 S.Ct. at p. 2565.)

The order of the Ninth Circuit in this case sanctions a decision by the district court which undermines California's rules on procedural default. Petitioner respectfully requests that this Court exercise its power of supervision and grant this petition for writ of certiorari.

ARGUMENT

I

A FEDERAL COURT ON COLLATERAL REVIEW MAY NOT IGNORE CALIFORNIA'S PROCEDURAL DEFAULT RULES SIMPLY BECAUSE THE CALIFORNIA SUPREME COURT RETAINS DISCRETION IN THE APPLICATION OF THOSE RULES

If the order of the United States Court of Appeals in this case is left intact, it sanctions a decision of the district court

which is clearly erroneous. The order states that two of California's procedural default rules are not "consistently" applied because the California Supreme Court retains discretion. The fact that the state court retains discretion in the application of its procedural default rules, however, does not mean that those procedural defaults may be disregarded by the federal court.

Petitioner's motion to dismiss claims 5 and 9 is based on real party's failure to raise the claims on direct appeal and the delay in raising them on habeas.[1/] The motion to dismiss claims 2, 10B, 19 and 20 is based on the delay in raising the claims

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1. In denying the state petition relative to these claims, the Supreme Court of the State of California stated that the claims "are denied on the independent additional ground that they were waived by a failure to raise them on direct appeal." (Appendix A.)

on habeas.[2/]

In denying petitioner's motion, respondent found that the rule that habeas corpus is not a substitute for direct appeal is not consistently applied because "the California Supreme Court retains discretion to deny [sic] a habeas claim that could have been raised on direct appeal, but was not." (Appendix C, pp. 4-5.) With respect to the issue of delay, respondent also found that "[petitioner] has failed to demonstrate that the California Supreme Court has applied the timeliness rule set forth in *Stankewitz* in a consistent manner." (Appendix C, p. 10.)

The rule that claims must be raised on

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2. In denying the two state petitions relative to these claims the Supreme Court of the State of California stated that the claims "are denied on the independent additional ground that the petition fails to justify the delay in raising them" (Appendix A), and that the claims are "denied for the independent reason that they are untimely." (Appendix B.)

appeal and the rule that delays in presenting claims must be justified are rules that serve legitimate state interests in ensuring that all legal claims are timely raised at the earliest opportunity. (See *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).) Since the California Supreme Court has occasionally indicated that it may forgive these procedural defaults for special circumstances or exceptional circumstances or as a matter of discretion, respondent concludes that the procedural rules invoked by the California Supreme Court in this case cannot preclude federal review because they are "discretionary." This conclusion is clearly erroneous.

In *Johnson* v. *Mississippi*, 486 U.S. 578 (1988), this Court rejected a claim of procedural default because the bar had not been "consistently or regularly" applied by

the Mississippi Supreme Court. (*Id.*, at 587-589.) This Court did not hold, however, that simply because the state court retains discretion, the procedural bar is not "consistently" applied.

Sullivan v. *Little Huntington Park*, 396 U.S. 222 (1969) also fails to support the proposition that a discretionary state procedural default does not bar federal review. When *Sullivan* characterized a Virginia procedural rule as "discretionary," it also did so in the sense that the Virginia courts had not consistently applied the rule. Use of the default appeared to be ad hoc and unprincipled. (See also *Williams* v. *Georgia*, 349 U.S. 375, 382-383 (1955).) *Sullivan* and *Johnson* merely reflect the long-settled rule that a state cannot create novel procedural obstacles or apply their procedural rules in an irregular or inconsistent manner so as to evade federal

review. This does not translate into a new exception for "discretionary" defaults that do not appear to be irregular or inconsistent or applied in a way to evade federal review. The mere fact that California retains some discretion does not mean that its procedural defaults are not regularly and consistently applied.

Harris v. *Reed*, 489 U.S. 255, 265 (1989) acknowledged that state courts often deny petitions on both procedural and substantive grounds, and created a presumption that the petition has been denied on the substantive merits absent a plain statement of procedural default. *Harris* implicitly recognizes that state courts in some instances have discretion to forgive procedural defaults.

Moreover, a plain statement that the court has exercised its discretion not to forgive a default provides an independent

and adequate state ground. If a discretionary default can never constitute an adequate ground, there would be no need for the plain statement rule as articulated in *Harris*. If the state court applied the discretionary rule, that rule would never be adequate to preclude federal review.

There can be no doubt that California state courts are well aware of the possibility of federal review. (*In re Spencer*, 63 Cal.2d 400, 406 (1965).) If procedural defaults will be respected only if mandatory under any circumstance, then there is no incentive for the state court to exercise any discretion; blind application of the default will at least protect the states' dignitary interest in seeing that state court decisions are not ignored. (*Coleman* v. *Thompson*, *supra*, 111 S.Ct. at p. 2559.)

Federal courts rely on state remedies

both as a matter of comity and judicial economy in resolving federal claims. However, the result of respondent's findings will be more work for the federal courts, the district court judges, and the magistrate-judges, since the state courts wil be encouraged not to reach the substantive issues.

Federal courts do not have the power to tell state courts how to write their opinions. (*Coleman* v. *Thompson*, *supra*, 111 S.Ct. at p. 2559.) State courts are on notice that when they do not list reasons, their denials are vulnerable to federal review absent a lower court order that cites a procedural rule. (*Hunter* v. *Aispuro*, ___ F.2d ___, 93 DAR 70, 12/31/91.) In this case, the California Supreme Court did cite reasons. These reasons are solidly established rules under California law for the denial of collateral relief. They are

rules of principled discretion which serve legitimate state interests in ensuring that all claims are raised in a timely manner at the earliest opportunity.

Furthermore, the California Supreme Court has set forth the parameters defining procedural default. Indeed, these standards have been long-settled and are not unlike standards employed in federal court.

The California Supreme Court has long held that collateral remedies are available when "direct remedies were inadequate for reasons for which the defendant was not responsible . . . ." (*In re Sterling*, 63 Cal.2d 486, 488, citing *In re Spencer*, *supra*, at p. 406.) In *Spencer*, *supra*, the California Supreme Court stated that it normally affords collateral relief "if the petitioner had no opportunity to raise the constitutional issue at trial and on appeal." (*Ibid.*, citing *In re Shipp*, 62

Cal.2d 547, 551-553 (1965).)

In *In re Shipp*, *supra*, the California Supreme Court explained why the petitioner had not shown "special circumstances which would rescue his case from the general rule" which precludes using habeas as a substitute for appeal. The petitioner had failed to object at trial or raise on appeal the ground that his confession was coerced. He did not contend that there was any newly discovered evidence that was not available at trial. He did not contend that new standards of coercion had been created after his appeal "so that he may rest upon that excuse for not fully presenting the issue at the trial level." (*Id.*, at 552-553.)

The fact that "special circumstances" will serve as an exception to a rule of procedural bar does not indicate that the rule itself is not routinely applied. As long as the exception is not irregular,

arbitrary, or inconsistently applied, the procedural default rule should be applied along with its exceptions. (See *Jimmy Swaggart Ministries* v. *Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688, 700 (1990).) There are very few, if any, procedural rules which do not have legitimate exceptions.

In short, the California standards for excusing failure to raise a claim on appeal, or delay in presenting claims on habeas, are not unlike the standards used by the federal courts in excusing procedural default, i.e., "cause." In *McCleskey* v. *Zant*, ___ U.S. ___, 111 S.Ct. 1454 (1991), it was held that "cause" requires a petitioner to show that some objective factor external to the defense impeded counsel's efforts . . . ." (*Id.*, at 111 S.Ct. 1470.) Moreover, these standards are "adequate," "well-defined in the case law," and "familiar to federal

courts." (*Id.*, at 1471.)

California standards for excusing substantial delay in seeking collateral relief are even more specific than the general rules of federal habeas corpus law discussed above. (*In re Stankewitz*, 40 Cal.3d 391, 396-397, fn. 1 (1985), citing *People* v. *Jackson*, 10 Cal.3d 265 (1973); see also *In re Swain*, 34 Cal.2d 300 (1949); *In re Dixon*, 41 Cal.2d 756, 760 (1953); *People* v. *Miller*, 6 Cal.App.4th 873, 881-884 (1992).)[3/]

The standards for excusing substantial delay have actually been made more explicit

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3. The Ninth Circuit has acknowledged California's delay rule. In *Van Geldern* v. *Field*, 498 F.2d 400, 402-403 (9th Cir. 1974), petitioner gave reasons for the lateness of raising a claim on habeas corpus. The *Van Geldern* court stated that petitioner's "excuse for the inadequacies of his petition does not compare unfavorably with others accepted by that court [California Supreme Court]." (*Van Geldern* v. *Field*, *supra*, 498 F.2d at pp. 402-403.)

in the last 10 years. In 1985, the California Supreme Court iterated that delay in seeking collateral relief would have to be justified. The court assumed that 18 months is "a substantial delay" and held that justification for such delay cannot be based on the fact that the petitioner waited until his appellate brief had been filed to seek collateral relief. (*In re Stankewitz*, *supra*, 40 Cal.3d at pp. 396-397, fn. 1.) This standard was in place and well-established before the first state habeas petition in the instant case was considered and rejected by the California Supreme Court.[4/]

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4. The California Supreme Court has also articulated a precise policy for the timing of habeas corpus petitions in capital cases, including an explicit time limit. These standards excuse delay if the petition is "filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the

Petitioner submits that the standards enunciated in California Supreme Court cases adequately define the parameters for relief from procedural default. The fact that the default may be excused in particular cases does not render the standards inadequate.

II

MANDAMUS IS AN APPROPRIATE REMEDY IN THIS CASE BECAUSE PETITIONER HAS NO OTHER EFFECTIVE MEANS OF REVIEWING THE DENIAL OF A MOTION TO DISMISS FOR PROCEDURAL DEFAULT

Petitioner submits that mandamus is an appropriate remedy for an order denying a motion to dismiss for procedural default, when that order is not effectively reviewable on appeal from a final decision in the underlying habeas corpus case.

Mandamus is an appropriate remedy when

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claim . . . ." Otherwise, a petitioner must show "good cause" for the delay. (California Supreme Court policies regarding cases arising from judgments of death, adopted June 6, 1989.)

there is no other adequate means, such as direct appeal, to attain the relief sought. (*Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976).)

In this case, respondent has foreclosed petitioner from asserting long-established procedural bars and defaults to six claims raised by real party in his petition for writ of habeas corpus. The issue of the viability of California's procedural default rules is entirely separate from real party's right to relief on the merits, and will not be reached on an appeal if petitioner succeeds on the merits. (See *Commonwealth of Pennsylvania* v. *Newcomer*, 618 F.2d 246 (3rd Cir. 1980) (where the court noted that the defendant's acquittal in federal court would prevent review of the issue because the People could not appeal).)

Since ordinary appeal will not protect petitioner's rights, mandamus is the proper

remedy. (Cf. *United States* v. *Hitchcock*, 93 D.A.R. 5328, 5329, 113 S.Ct. ___ (April 19, 1993).)

Even the limited availability of post-trial review will not preclude mandamus. (*People of the State of California* v. *Mesa*, 813 F.2d 960, 963 (9th Cir. 1987).) In *Mesa*, the court recognized the "odd position" the state would be put in by having to appeal convictions to obtain a reversal to protect its interests just as petitioner herein would have to appeal the denial of real party's habeas writ to protect the state's interest in preserving procedural default. "Mandamus is appropriate to avoid this awkward result." (*Id.*, at 963.)

Mandamus is also appropriate where the petitioner will be damaged or prejudiced in a way not correctable on appeal. (*Arthur Young & Co.* v. *United States District Court*,

549 F.2d 686, 691-692 (9th Cir. 1977) quoting from *Kerr* v. *United States District Court*, *supra*, 426 U.S. at p. 394.) In this case, petitioner will indeed be damaged and prejudiced in ways not correctable on appeal. By denying a motion to dismiss which should have been granted because of procedural default, the petitioner is required to answer the claims on the merits. Substantial time and expense to the litigants and to the district court will be required, particularly if an evidentiary hearing is requested on any of the claims. Relief by way of mandamus would curtail a portion of this litigation and minimize the total burdens of litigation on the parties and the judicial system. These costs are in no way recoverable on appeal. These adverse effects threaten petitioner with irreparable harm. (See *Rowland* v. *U.S. District Court for N.D. of Cal.*, 849 F.2d 380, 382 (9th

Cir. 1988).)

Mandamus is also an appropriate remedy because the district court's order is clearly erroneous. (See Argument I, *supra*; *Arthur Young & Co.* v. *United States District Court*, *supra*, 549 F.2d at 691-692.)

Mandamus is also an appropriate remedy in this case because the district court's order may be an oft-repeated error. (*LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 255-260 (1957).) Petitioner is aware of at least one other case, *Karis* v. *Vasquez*, No. CIV. S-89-527-LKK/JFM, in which the Magistrate's findings and recommendations, dated January 22, 1993, preclude assertion of California's procedural default rules. The findings and recommendations in that case are very similar to respondent court's order in the instant case. Thus, there is a reasonable probability that the order in this case, if not corrected, is the first

litigated instance of what will be an oft-repeated error.

Finally, mandamus is an appropriate remedy in this case because the district court's order raises a new and important problem and issues of first impression. (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 111 (1964).)

The importance of this problem cannot be minimized, for California's procedural defaults have been effectively nullified in federal court by respondent's order in this case. The order threatens to undermine federalism by interfering with the state's fundamental interest in the administration of its own criminal justice system. (*Will* v. *United States*, 389 U.S. 90, 95 (1967).) The significance of this case is further highlighted by this Court's recent restatement of the rule that federal courts have no jurisdiction to consider claims

resolved on independent state grounds. (*Sochor* v. *Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2119 (1992).)

Also, the meaning of the term "discretion," as applied to the California courts' application of procedural default rules, and the scope of "regularly applied" defaults, are questions of first impression. (Compare *Gutierrez* v. *Moriarity*, 922 F.2d 1364 (10th Cir. 1991) with *Prijoda* v. *McCaughtry*, 910 F.2d 1379 (7th Cir. 1990).)

This Court has long recognized the overriding policy of preventing federal interference with the state's fundamental interest in the administration of its own criminal justice system. (*Coleman* v. *Thompson*, *supra*, 111 S.Ct. 2546; *McCleskey* v. *Zant*, *supra*, 111 S.Ct. 1454; *Teague* v. *Lane*, 489 U.S. 288, 309 (1989); *Francis* v. *Henderson*, 425 U.S. 536, 539 (1976).) This Court has held that mandamus is an

appropriate remedy because of the delicate issue of federal-state relations raised. (*Maryland* v. *Soper*, 270 U.S. 9, 29-30 (1926).) Likewise, the federalism concerns in the instant case justify mandamus.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari and reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: July 2, 1993

Respectfully submitted,

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